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The European Convention on Human Rights Act 2003 – Ten Years On.

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Abstract.

The European Convention on Human Rights Act 2003 has now been in force in Ireland for ten years. This article analyses the Act itself and the impact which it has had on the Irish courts during the first decade of its operation. The use of the European Convention in the Irish courts prior to the enactment of the legislation is discussed, as are the reasons for the passing of the Act. The relationship between the Act and the Irish Constitution is examined, as is the jurisprudence of the Irish courts towards the interpretative obligation found in section 2(1), and the duty placed upon organs of the State by section 3(1). The article ends with a number of observations regarding the impact which the Act has had on the Irish courts at a more general level. Comparisons will be drawn with the UK's Human Rights Act 1998 throughout the discussion.

Keywords.

Human Rights; European Convention on Human Rights Act 2003; Irish Courts; Irish Constitution; Human Rights Act 1998.

1. Introduction.

On 1 January 2004 the provisions of the European Convention on Human Rights (ECHR) became part of the domestic law of Ireland under the European Convention on Human Rights Act 2003. As of January 2014, this legislation has therefore been in force for ten years. This paper seeks to analyse the Act itself and the impact which it has had on the Irish courts during the first decade of its operation. The Irish legislation follows a familiar pattern, in that its structure contains strong similarities to that of the United Kingdom's Human Rights Act 1998, and comparisons will be drawn with the UK legislation during the course of the discussion. The article will begin by examining the use of the European Convention in the Irish courts prior to the enactment of the European Convention of Human Rights Act, and will proceed to analyse the reasons for the passing

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of the Act. The relationship between the Act and the Irish Constitution will then be examined, as will the jurisprudence of the Irish courts towards the interpretative obligation found in section 2(1) of the Act. The approach of the courts towards the duty placed upon organs of the State by section 3(1) to perform their functions in a manner 'compatible with the State's obligations under the Convention provisions' will also be discussed. The article will end with a number of observations regarding the impact which the Act has had on the Irish courts at a more general level.

2. The European Convention in the Irish Courts Prior to 2004.

Although the European Convention on Human Rights has only been incorporated into domestic law in Ireland since 2003, the Irish courts were in fact adjudicating on rights based issues long before that date. The Irish Constitution of 1937 is the foundational law of the state, and this Constitution incorporates a list of fundamental rights. Article 40 of the Constitution is entitled 'personal rights', and includes provisions such as a right to be held equal before the law;¹ a right to personal liberty;² a right to express freely convictions and opinions; a right to assemble peaceably; and a right to form associations and unions.³ Article 41 contains particular protections for the family unit, for example under article 41.1.2 the state 'guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.' Article 42 contains a right to education and article 43 sets out a right to the ownership of private property. Article 44 contains a right to freedom of religion. The Irish courts are tasked with the application of these rights. In addition, article 40.3.1 states that, 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.' Article 40.3.2 proceeds to assert that, 'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.' In 1965 it was declared in *Ryan v Attorney-General*⁴ that the Constitution does not exhaustively enumerate the rights of Irish citizens, and articles 40.3.1 and 40.3.2 have since provided a 'rich source of unenumerated rights in Irish constitutional law.'⁵ For example, in *Ryan* the plaintiff

¹ Article 40.1.

² Article 40.4.

³ Article 40.6.1.

⁴ [1965] I.R. 294.

⁵ KL Bodnick, 'Bringing Ireland Up to Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2002-2003) 26 *Fordham International Law Journal* 396-451 at 419.

argued that articles 40.3.1 and 40.3.2 of the Constitution implicitly provided a right to bodily integrity, and that the Health (Fluoridation of Water Supplies) Act 1960 breached this right. The High Court stated that the inclusion of the phrase ‘in particular’ in article 40.3.2 provided for the protection of unenumerated personal rights, such as a right to bodily integrity and a right to privacy.⁶ Nevertheless, the case law of the Irish courts on ‘unenumerated rights’ is somewhat inconsistent, and it is difficult to identify an objective source for such rights.⁷

Ireland ratified the European Convention on Human Rights in February 1953, and was thus one of the earliest states to do so. However, Ireland is a dualist state, therefore treaties do not form part of national law until they are incorporated by domestic legislation. Article 29.6 of the Constitution states that ‘no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas (the Irish Parliament).’ Indeed the provisions of the European Convention were not incorporated into domestic law in Ireland for over half a century after ratification. The question arises therefore of what status did the Convention have in Ireland, given the constitutional position?

In order to investigate the impact that the Convention had on the Irish courts prior to incorporation, the author carried out a survey of all the Irish cases on the ‘Justis’ database which were heard prior to 1 January 2004 and in which the European Convention was cited significantly.⁸ In this survey, eighty such cases were found, dating from between 1960 and 2003. As regards the specific articles of the European Convention which were cited in these cases, article 6 (the right to a fair trial) was referred to most frequently, being cited in twenty-eight cases. Article 10 (the right to freedom of expression) was cited in twelve cases, and article 14 (the prohibition of discrimination) was referred to on six occasions. Article 8 (the right to private and family life) received five mentions. Article 1 of the First Protocol (the right to peaceful enjoyment of possessions) was cited in three cases, as was article 7 (the right to be free from retrospective punishment). Article 5 (the right to liberty and security) was referred to twice. Article 2 (the right to life); article 3 (the right to be free from torture and inhuman or degrading treatment or punishment); and article 12 (the right to marry and found a family) each received one

⁶ It was however held by both the High Court and the Supreme Court that the legislation in question violated neither the right to bodily integrity nor the right to privacy.

⁷ For example, Bodnick, *supra* n 5 at 422-425.

⁸ The Justis database includes coverage of the *Irish Reports*, the *Irish Reports Digest*, the *Irish Law Reports Monthly Digest*, the *Irish Law Times Reports Digest*, the *Irish Jurist Reports Digest*, the *Irish Law Journal Digest* and the *Irish Special Reports Digest*. It therefore represents comprehensive coverage of the reported decisions of the Irish courts.

mention, as did article 2 of the First Protocol (the right to education) and article 2 of the Fourth Protocol (the right to freedom of movement). There were also twenty-five cases which contained general references to the European Convention without specifying any particular articles.

Nevertheless, despite references being made to the European Convention, it seems that in the vast majority of cases such references made no difference whatsoever to the actual outcomes of the cases in question. As was commented in *The People (Director of Public Prosecutions) v M.S.*,

Judges can and do refer to the Convention and the jurisprudence of the Court of Human Rights by way of analogy when considering issues relating to matters to which the Convention applies, but it is not within their jurisdiction to determine whether a particular statutory provision is of no effect because it is in breach of, or inconsistent, with the Convention.⁹

Arguments based on the Convention were put forward in various cases only to be met with a refusal by the courts to consider such arguments, due to the fact that the Convention was not part of domestic law in Ireland. As O'Connell, writing in 1995, remarked, 'the orthodox view is that the ECHR does not form part of our domestic law and is therefore of minimal value to litigants before Irish courts.'¹⁰ Indeed, the approach of the courts is summarised neatly by the words of Budd J. in *Brennan v Governor of Portlaoise Prison* in which he stated that 'it must be remembered that the Convention applies to Ireland but does not apply within Ireland.'¹¹

The Irish Supreme Court considered the question of the application of the European Convention in the case of *In re O Laighleis*,¹² in which the applicant argued that his internment constituted a breach of the right to liberty under article 5 of the European Convention on Human Rights and also a violation of the right to a fair trial under article 6 of the Convention. In this judgment Maguire C.J. stated that,

The insuperable obstacle to importing the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms into the domestic law of Ireland...is...the terms of the Constitution of Ireland. By Article 15.2.1 of the

⁹ [2003] 1 I.R. 606.

¹⁰ D O'Connell, 'Review of the Cases from the Republic of Ireland in Strasbourg over the Last Decade' in G Quinn (ed), *Irish Human Rights Yearbook* (Round Hall, Dublin, 1995) 1 at 2.

¹¹ [1999] 1 ILRM 190.

¹² [1960] I.R. 93.

Constitution it is provided that ‘the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.’ Moreover, Article 29...provides at section 6 that ‘no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.’

The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law...The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms.¹³

This passage was cited by the Irish courts in numerous cases thereafter.¹⁴ One such case was *Norris v The Attorney General*.¹⁵ This case is of particular note as it was eventually taken to the European Court of Human Rights, where a violation of article 8 was found.¹⁶ In this case the plaintiff argued that certain provisions of the Offences Against the Person Act 1861 and of the Criminal Law Amendment Act 1885 were inconsistent with the Irish Constitution. In doing so, he claimed that since Ireland had ratified the European Convention, there arose a presumption that the Constitution was compatible with the Convention. Therefore, in considering a question as to the consistency of statutory provisions with the Constitution, regard should be had as to whether the laws being considered were consistent with the Convention itself. However, this argument was dismissed by the Supreme Court. Higgins C.J. stated that acceptance of this submission,

would be contrary to the provisions of the Constitution itself and would accord to the Government the power, by an executive act, to change both the Constitution and the law. The Convention is an international agreement to which Ireland is a subscribing party. As such, however, it does not and cannot form part of our domestic law, nor affect in any way questions which arise thereunder.

¹³ At 124.

¹⁴ The *O Laighleis* approach is also discussed in GF Whyte, ‘The Application of the European Convention on Human Rights before the Irish Courts’ (1982) 31 *International and Comparative Law Quarterly* 856-861.

¹⁵ [1984] I.R. 36.

¹⁶ *Norris v Ireland*, app. no. 10581/83, 26 October 1988.

Likewise, in *Croke v Smith and Others*,¹⁷ Budd J. commented that, ‘while the Court can look to the ECHR and the United Nations principles as being influential guidelines with regard to matters of public policy’, nevertheless when adjudicating on the question of constitutionality the court is ‘bound to approach this issue wearing blinkers as to Conventions setting out internationally accepted norms and standards’. A similar approach was also adopted in *O’B v S*.¹⁸ This case related to the succession rights of an individual born outside marriage to the estate of her father who had died intestate. The plaintiff attempted to rely on *Marckx v Belgium*,¹⁹ a decision of the European Court of Human Rights which had addressed a similar issue and in which the Court had found a violation of article 14 of the Convention, taken in conjunction with article 8. This argument was however doomed to failure, with the Court in *O’B v S* stating that the decision in *Marckx v Belgium* ‘can have no bearing on the question of whether a provision of the (relevant national legislation) is invalid having regard to the provisions of the Constitution.’²⁰ The Court proceeded to state that ‘there is no object to be served by this Court entering into any examination of what conflict, if any, exists between the decision in the *Marckx* case and the provisions of the (national legislation).’²¹ The claimant took her case to the European Court, with the result being a friendly settlement.

Indeed, there were occasions in which the Irish courts refused to give effect to decisions of the European Court of Human Rights, even when the decision in question was made against Ireland itself. For example, in *Airey v Ireland*²² the European Court of Human Rights held that Ireland was in violation of articles 6 and 8 of the European Convention due to the state’s failure to provide the applicant with legal aid to obtain legal representation in seeking a judicial separation from her husband in a case involving domestic violence. Following this decision, the Irish government introduced a civil legal aid and advice scheme in January 1980. However, in *E v E*²³ the defendant argued that this scheme was insufficient and that Ireland remained in violation of article 6. In this case, the plaintiff brought an action seeking custody of her three children and also financial support from her husband. The defendant applied for legal aid in order to pay for representation, however his application was rejected. He subsequently argued on the

¹⁷ Unreported, High Court, 27 and 31 July 1995.

¹⁸ [1984] I.R. 36.

¹⁹ (1979-80) 2 E.H.R.R. 330.

²⁰ At 338.

²¹ At 339.

²² App. no. 6289/73, 9 October 1979.

²³ [1982] ILRM 497.

basis of *Airey v Ireland* that the state was in violation of the European Convention by failing to provide him with legal aid. Nevertheless, the Court refused to grant legal aid in this instance, holding that the decision of the European Court in *Airey* was not binding on the Irish courts. Essentially, the Court was of the view that if a citizen were dissatisfied with the response of the Irish government to a decision of the European Court, the appropriate course of action was to make an application to the European Court. O'Hanlon J. commented that,

It appears to me that the defendant in the present proceedings is claiming that the State in setting up the Scheme of Civil Legal Aid and Advice did not go far enough in complying with the requirements of the European Convention, as interpreted by the Court of Human Rights in the *Airey* case, and that as a result the defendant in the present action is in danger of finding himself without any legal representation in continuing proceedings of a nature and complexity comparable to those which obtained in the *Airey* case. As this contention is strongly disputed by the Attorney General, it appears to me to be a dispute which should properly be determined by the procedure provided for in the European Convention, involving a reference of the matter to the European Commission initially, with the possibility of a later determination by the Court of Human Rights.²⁴

Prior to the enactment of the European Convention on Human Rights Act 2003, plaintiffs seeking to rely on the European Convention put forward a variety of interesting arguments in their quests to do so. For example, in *Murphy v G.M.*²⁵ the appellants based their argument on article 29.3 of the Irish Constitution, which states that, 'Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.' They contended that the provisions of the European Convention ought to be considered as being part of the 'generally recognised principles of international law' and that, as the Convention confers rights on individuals, any legislative measure which was in conflict with the provisions of the Convention must be considered repugnant to the Constitution. The Supreme Court however was adamant that,

This case concerns the application of domestic legislation to persons within the jurisdiction of the State. In these circumstances, it is not relevant or necessary to consider the application of the 'principles of international law' in this case or in

²⁴ At 499-500.

²⁵ *Michael Murphy v G.M., P.B., P.C. Ltd., G.H.; John Gilligan v Criminal Assets Bureau, Barry Galvin, Revenue Commissioners, Frank Lannigan, The Garda Commissioner, Ireland and the Attorney General* [2001] 4 I.R. 113.

particular whether the provisions of the European Convention on Human Rights ought to be treated as included in those ‘principles’, as Article 29.3 of the Constitution makes clear that these general principles, whatever their content, govern relations with other sovereign states at an international level.

The Court also made the point that article 29.6 of the Constitution expressly provides that no international agreement would be part of the domestic law of the state except as may be determined by the legislature. Essentially, ‘international treaties do not create obligations or rights presentable to an Irish court unless they are successfully incorporated into Irish domestic law.’²⁶

A similar argument based upon article 29.6 of the Constitution was attempted in *M.F.M. v M.C. (Proceeds of Crime)*.²⁷ In this case the applicant argued that Article 29.3 of the Constitution had incorporated the provisions of the European Convention into the Constitution. Again this argument received short shrift from the Court, with O’Sullivan J. commenting that,

It seems to me that (the Irish Constitution) provides at Article 46 an explicit mechanism for the amendment of the Constitution itself whether by way of variation, addition or appeal. I cannot construe Article 29.3 as in any way or in any case supplanting this mechanism. Not only does this sub-article not say that the Constitution shall be amended in accordance therewith as appropriate but if this were to be implied it could indeed give rise to a situation where an instrument solemnly adopted by the people and solemnly amended from time to time by the people could also from time to time be amended without such ratification. This seems to me to be entirely repugnant to the fundamental principles which underpin the Constitution...Such an interpretation would, in truth, upend the Constitution itself.

Another argument which was attempted was one based on the Treaty of Rome and Ireland’s membership of the European Union. Writing in 1997, Connelly stated that, ‘Given the primacy of European Community law over domestic law, it is possible that at some time in the future the courts will give effect indirectly to the Convention as part of Community law.’²⁸ However, the Irish courts have since dismissed this possibility. For

²⁶ Bodnick, *supra* n 5 at 415.

²⁷ *In the matter of the Proceeds of Crime Act 1996. M.F.M.v M.C., J.W., P.C. and J.C., (Proceeds of crime)* [2001] 2 I.R. 385.

²⁸ A Connelly, ‘Ireland and the European Convention’ in B Dickson (ed), *Human Rights and the European Convention* (Sweet & Maxwell, London, 1997) 185 at 197.

example, in *Abdi v Minister for Justice*²⁹ the applicant drew the Court's attention to the fact that Article 6 of the Treaty of Rome states that the fundamental rights as found in the European Convention on Human Rights will be respected in the member states. He argued that, as it was established in article 29.4.4 of the Constitution that the laws of the European Union have supremacy in Irish law, this meant that Ireland was obliged to give effect to the European Convention on Human Rights. However, again this argument was unsuccessful. Smyth J. commented that, 'Article 6 of the Treaty of Rome...does not purport to make the Convention part of the domestic law of the member states and does not have that effect. The language of Article 6...is directed at the European Union *qua* institution, not at individual member states.'³⁰ Essentially, the Irish courts were 'emphatic that human rights protection in Ireland must be grounded in Irish law',³¹ as opposed to treaties such as the European Convention on Human Rights, and therefore 'steadfastly resisted attempts by litigants directly to rely on the ECHR'.³²

Nevertheless, there were also some more positive comments from the judiciary during this period regarding the use of the European Convention in the Irish courts. For example, in *Murphy v I.R.T.C.* it was commented that,

Although the European Convention on Human Rights is not part of Irish municipal law, regard can be had to its provisions when considering the nature of a fundamental right and perhaps more particularly the reasonable limitations which can be placed on the exercise of that right.³³

Likewise, in *Eamonn Kelly v Paul O'Neill and Conor Brady*,³⁴ a case involving the Irish law on contempt of court, it was stated that, 'there is no doubt that when considering the balance which is required to be struck between the protection of the due administration of

²⁹ *Osman Bakar Abdi v The Minister for Justice, Equality and Law Reform, The Interim Refugee Authority, Ireland and The Attorney General* [2002] 4 I.R. 234.

³⁰ Similar arguments were made in *Toma Adam and Others v The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General*; *Florin Iordache v The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General* [2001] 3 I.R. 53; and in *Kavanagh v The Government of Ireland, The Director of Public Prosecutions, The Attorney General and The Special Criminal Court* [1996] 1 I.R. 321.

³¹ R Murphy, 'The Incorporation of the ECHR into Irish Domestic Law' (2001) *European Human Rights Law Review* 640-656 at 642.

³² G Hogan, 'The Belfast Agreement and the Future Incorporation of the European Convention of Human Rights in the Republic of Ireland' (1999) *The Bar Review* 205-211 at 205.

³³ [1997] 2 ILRM 467 at 476.

³⁴ [2000] 1 I.R. 354.

justice and freedom of expression the jurisprudence of the European Court on Human Rights may provide helpful guidelines.’ In *Desmond v Glackin*, O’Hanlon J. commented that,

As Ireland has ratified the Convention and is a party to it, and as the law of contempt of court is based...on public policy, I think it is legitimate to assume that our public policy is in accord with the Convention or at least that the provisions of the Convention can be considered when determining issues of public policy. The Convention itself is not a code of legal principles which are enforceable in the domestic courts, as was made clear in *In re O Laighleis*..., but this does not prevent the judgment of the European Court from having a persuasive effect when considering the common law regarding contempt of court in the light of the constitutional guarantees of freedom of expression contained in our Constitution of 1937.³⁵

In *Denis O'Brien v Mirror Group Newspapers Ltd., Piers Morgan, Neil Leslie and Karl Brophy* it was commented that ‘decisions of the European Court of Human Rights on the...European Convention may be persuasive authority in the analysis of similar constitutional rights, in the same way as decisions of other constitutional courts’.³⁶ In *State (Healy) v Donoghue*³⁷ article 6 of the European Convention, along with U.S. case law, was cited in support of the principle that the state must afford the opportunity of being legally represented to a person who is charged with a serious criminal offence and who is unable to pay for legal representation. O’Higgins C.J. commented that the Convention demonstrated that it was ‘generally recognised throughout Europe that, as one of his minimum rights, a poor person charged with a criminal offence had the right to have legal assistance provided for him without charge.’³⁸ Likewise, in *State (D.P.P.) v Walsh and Conneely* it was remarked in respect of the requirements of justice in dealing with a charge of contempt that, ‘There is a presumption that our law in this respect is in conformity with the European Convention on Human Rights particularly Articles 5 and 10(2) thereof.’³⁹ In *Re R. Ltd*⁴⁰ various international human rights provisions, including article 6 of the European Convention, were cited as evidence of the principle that justice

³⁵ [1992] ILRM 490 at 513.

³⁶ [2001] 1 I.R. 1.

³⁷ [1976] I.R. 325.

³⁸ At 351.

³⁹ [1981] I.R. 412 at 440.

⁴⁰ [1989] I.R. 126.

should be administered in public. In *Finucane v McMahon*, in relation to the issue of extradition, Walsh J. commented that the national courts should not,

ignore the answerability of the State to the organs of the European Convention of Human Rights and Fundamental Freedoms if a particular fugitive offender is handed over to any other state, whether a member of the Council of Europe or not, where the courts are not satisfied that his treatment there would not be in breach of the rights protected by the Convention.⁴¹

Nevertheless, overall it was abundantly clear that the courts were very reluctant to consider arguments based upon the European Convention prior to the enactment of the European Convention on Human Rights Act 2003. As was stated in *Doyle v Garda Commissioner*,

The Convention may overlap with certain provisions of Irish constitutional law and it may be helpful to an Irish court to look at the Convention when it is attempting to specify certain rights guaranteed by Article 40.3 of the Constitution. Alternatively, the Convention may, in certain circumstances, influence Irish law through European Community law. But the Convention is not part of domestic law and the Irish court has no power in its enforcement.⁴²

The approach of the Irish judiciary to arguments based upon the Convention prior to the 2003 legislation can be contrasted with that of the English judiciary before the enactment of the Human Rights Act 1998. Prior to the passing of the latter, many observers were of the opinion that the English judiciary was already ‘engaged in the infusion of the substance of the Convention into English law’.⁴³ However it would seem that the approach of the judiciary in the Irish Republic was more akin to that of its counterpart in Northern Ireland. For example, it was commented in 1996 that, ‘one can safely say that the views of the Northern Irish judiciary as to the applicability of the European Convention in Northern Irish law are restrictive.’⁴⁴ Indeed it certainly appeared to be the case that the Northern Irish courts were not particularly receptive to arguments based on the European Convention during this period.⁴⁵ Nevertheless, as regards the courts in the

⁴¹ [1990] 1 I.R. 165 at 217.

⁴² [1998] 2 ILRM 523 at 529.

⁴³ MJ Beloff and H Mountfield, ‘Unconventional Behaviour? Judicial uses of the European Convention in England and Wales’ (1996) *European Human Rights Law Review* 467-495 at 468.

⁴⁴ B Dickson, ‘The European Convention in Northern Irish Courts’ (1996) *European Human Rights Law Review* 496-510 at 510.

⁴⁵ See further R McQuigg, ‘A “very limited” effect or a “seismic” impact? A study of the impact of the Human Rights Act 1998 on the Courts of Northern Ireland’ (2010) *Public Law* 550-563.

Republic of Ireland, it must be remembered that the judiciary is charged with the application of the Irish Constitution and so it may be somewhat unjust to criticise the judges for their reluctance to consider arguments based upon the European Convention. As O'Connell remarks, such criticism may only be warranted if it is 'based on an objection to strict construction of the Constitution or, at least, to the form of strict construction used by certain Irish judges.'⁴⁶

3. The Incorporation of the European Convention on Human Rights.

It is however interesting to note that, despite the fact that the European Convention was not incorporated into domestic law in Ireland until 2003, the state nevertheless maintained a relatively good record before the European Court of Human Rights. As Hogan comments, the fact that Ireland was the last member state of the Council of Europe to give effect to the European Convention in its domestic law 'only serves to give an entirely false picture of Ireland's commitment to human rights protection.'⁴⁷ In reality, Ireland was the first state to accept the right of individual petition to the European Court and was found to be in violation of the European Convention in only ten cases prior to the enactment of the European Convention on Human Rights Act, ranging in dates from 1979 to 2003. As Hogan remarks, 'At the risk of sounding complacent, this record cannot be regarded as other than a very good one.'⁴⁸ O'Connell states that 'the number of Irish cases considered by the Court of Human Rights is small and few enough Irish cases break new ground in terms of ECHR jurisprudence.'⁴⁹ Breaches of article 6 (the right to a fair trial) were found in five of the ten cases;⁵⁰ and violations of article 8 (the right to respect for private and family life) were found in four instances.⁵¹ The Court also found one violation each of article 5 (the right to liberty);⁵² article 10 (the right to

⁴⁶ D O'Connell, 'Watched Kettles Boil (Slowly): The Impact of the ECHR Act 2003' in U Kilkelly (ed), *ECHR and Irish Law* (2nd ed., Jordan Publishing Limited, Bristol, 2009) 1 at 5.

⁴⁷ G Hogan, 'Ireland: The European Convention of Human Rights Act 2003' (2006) 12 *European Public Law* 331-343 at 332.

⁴⁸ Hogan, *supra* n 32 at 205.

⁴⁹ O'Connell, *supra* n 46 at 4.

⁵⁰ *Airey v Ireland*, app. no. 6289/73, 9 October 1979; *Keegan v Ireland* app. no. 16969/90, 26 May 1994; *Quinn v Ireland* app. no. 26887/97, 21 December 2000; *Heaney and McGuinness v Ireland* app. no. 34720/97, 21 December 2000; *Doran v Ireland* app. no. 50389/99, 31 July 2003.

⁵¹ *Airey v Ireland*; *Keegan v Ireland*; *Johnston and Others v Ireland* app. no. 9697/82, 18 December 1986; *Norris v Ireland*, app. no. 10581/83, 26 October 1988.

⁵² *D.G. v Ireland* app. no. 39474/98, 16 May 2002.

freedom of expression);⁵³ article 13 (the right to an effective remedy);⁵⁴ and article 14 (the right to non-discrimination) taken in conjunction with article 1 of the First Protocol (the right to peaceful enjoyment of possessions).⁵⁵ By contrast, the UK was found to be in violation of the Convention in 52 cases before the European Court prior to the enactment of the Human Rights Act 1998. It can be seen therefore that the decision to incorporate the European Convention into domestic law in Ireland cannot be attributed to a poor record before the European Court of Human Rights.

In reality, the incorporation of the Convention was largely due to commitments made by the Irish government as part of the Good Friday Agreement of 1998. In addition to establishing the arrangements for the governance of Northern Ireland, this document also contained commitments by both the British and Irish governments on a number of matters, including in the area of human rights protection. As Anthony comments, the Agreement ‘remains as an achievement that challenges long-settled norms of Irish and UK constitutional law’.⁵⁶ As part of the commitments made in the Agreement, the Irish government stated that it would,

take steps to further strengthen the protection of human rights in its jurisdiction. The Government will...bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.⁵⁷

As O’Connell *et. al.* comment, ‘In substantive legal terms, the incorporation of the ECHR into Irish law was probably the most important human rights development to emerge in the Republic from the signing of the Belfast / Good Friday Agreement in 1998.’⁵⁸ It should however be noted that the commitment of the Irish government was only to

⁵³ *Open Door and Dublin Well Woman v Ireland* app. no. 14234/88, 14235/88, 29 October 1992.

⁵⁴ *Doran v Ireland*.

⁵⁵ *Pine Valley Developments Ltd and Others v Ireland* app. no. 12742/87, 29 November 1991.

⁵⁶ G Anthony, ‘Cluttered Convergence? European Fundamental Rights Standards in Irish and UK Public Law’ (2004) *Public Law* 283-304 at 296.

⁵⁷ Good Friday Agreement 1998. Para. 9 of section entitled ‘Rights, Safeguards and Equality of Opportunity’.

⁵⁸ D O’Connell, S Cummiskey, E Meenaghan and P O’Connell, *ECHR Act 2003: A Preliminary Assessment of Impact* (Law Society of Ireland and Dublin Solicitors Bar Association, Dublin, 2006) at p.10.

‘examine’ the issue of incorporation of the European Convention – it did not in reality go so far as to mandate the actual incorporation of the Convention. Nevertheless, following the passing of the Human Rights Act 1998 in the UK, Ireland found itself in the ‘embarrassing position’⁵⁹ of being the last remaining state in the Council of Europe not to have incorporated the Convention into national law. Given this situation and the requirement under the Agreement to examine the issue further, at this stage incorporation appeared to take on almost an air of inevitability. In addition, in the context of the cross-border bodies and the North-South Ministerial Council which were to be set up in the wake of the Good Friday Agreement, it was important to have ‘a neutral yardstick of fundamental rights protection.’⁶⁰ As Hogan remarks, ‘Irrespective of the legal virtues of the Constitution as compared with the ECHR, the latter provides a politically neutral template for sensitive cross-border dealings which the former could never hope to attain.’⁶¹

Prior to the signing of the Good Friday Agreement, the incorporation of the European Convention into domestic law had never been a major issue of concern to the main political parties, although Fianna Fail had called for incorporation in 1975. Likewise, this was not an issue on which many non-governmental organisations tended to campaign.⁶² Writing in 1995, O’Connell remarked that, ‘Debates on crucial issues such as incorporation of the Convention...have been lamentably absent in (Ireland)’.⁶³ Indeed, there was a view in some quarters that incorporation would encroach upon Ireland’s national sovereignty. It was also felt that direct legislative incorporation would mean that the margin of appreciation afforded to states as regards interpretation of the Convention provisions would move from the legislature to the judiciary, as it would be judges who would decide in any given case whether the law or state action in question complied with the provisions of the Convention.⁶⁴ In addition, as Hogan comments, the fact that Ireland was the last state within the Council of Europe to incorporate the provisions of the Convention into domestic law,

stemmed largely from the dualist character of the State along with the (admittedly slightly complacent) assumption that the existence of corresponding guarantees in

⁵⁹ Murphy, *supra* n 31 at 649.

⁶⁰ Hogan, *supra* n 32 at 210.

⁶¹ Hogan, *supra* n 32 at 210.

⁶² O’Connell *et al*, *supra* n 58 at 12.

⁶³ O’Connell, *supra* n 10 at 14.

⁶⁴ Murphy, *supra* n 31 at 641-642.

the fundamental rights provisions of the Constitution of Ireland rendered such incorporation unnecessary and superfluous.⁶⁵

It is certainly true that the Irish Constitution contains ‘an impressive array of individual rights’, particularly given the fact that this document was drafted well in advance of the formulation of key human rights instruments such as the Universal Declaration on Human Rights of 1948 and the European Convention on Human Rights of 1950.⁶⁶ Indeed the Irish government was of the opinion that incorporation of the European Convention was unnecessary as the Constitution provided superior rights protection, and it would be impractical to have two instruments regarding the protection of rights.⁶⁷ For example, in October 1993 the then Minister for Justice, Maire Geoghegan-Quinn TD stated that, ‘It would be difficult to incorporate into our laws, whether by means of a constitutional amendment or legislation, new provisions which duplicate many of those already in the Constitution.’⁶⁸ In some respects, it is certainly true to say that such arguments were not entirely without substance. There is indeed ‘a striking degree of overlap between the respective guarantees (as judicially interpreted) contained in the Constitution and the Convention.’⁶⁹ In addition, guarantees relating to personal liberty, non-discrimination on the grounds of religious belief and the separation of powers are all more extensive under the Irish Constitution than under the European Convention.⁷⁰

Indeed, even by 1998 the Irish government did not seem particularly enthusiastic as regards the incorporation of the Convention rights into national law. In February 1998 David Andrews TD, the then Minister for Foreign Affairs, stated that,

With regard to the implementation in Ireland of the provisions of the European Convention on Human Rights, it has been the view of successive Irish Governments that rights guaranteed under the Constitution, relevant legislation and common law rights in Ireland, fully correspond to, and in places exceed those available through the Convention. These rights are, of course, justiciable in our domestic courts. I should point out that while we are committed to equivalence between the human rights regimes North and South, this does not mean that precisely identical mechanisms have to be in place in the two jurisdictions.

⁶⁵ Hogan, *supra* n 47 at 332.

⁶⁶ Murphy, *supra* n 31 at 641.

⁶⁷ Murphy, *supra* n 31 at 646.

⁶⁸ M. Geoghegan-Quinn TD, *Dail Debates*, volume 434, 14 October 1993.

⁶⁹ Hogan, *supra* n 32 at 208.

⁷⁰ Murphy, *supra* n 31 at 646.

However, we are prepared to examine actively proposals for incorporation if it appears that this would be necessary to ensure the equivalence we seek between human rights regimes in the North and the South. In this context, the Government has decided to ask the relevant Departments to look again at the various complex legal and practical issues, including those relating to the Constitution that would be involved in the incorporation of the European Convention into domestic legislation.’⁷¹

Prior to the enactment of the European Convention on Human Rights Act, various methods of proceeding were put forward. In 1996 a limited form of incorporation of the Convention was recommended by the Constitution Review Group, whereby the Convention and other international human rights instruments would be used as a source of supplementary rights protection in situations in which the right in question was not expressly protected by the Constitution; the standard of protection of the right was superior to that guaranteed by the Constitution; or the wording of a clause of the Constitution protecting the right might be improved.⁷² However, this recommendation was not pursued. As Hogan commented in 1999, one difficulty with such an approach would be that it would necessitate a very careful analysis of each of the individual rights provisions contained in the Constitution in order to ascertain whether these criteria were fulfilled.⁷³ A potential course of action which was rejected by the Constitution Review Group was simply to replace the existing rights protections contained in Articles 40-44 of the Constitution with the European Convention. However, the Review Group stated that such an approach would result in ‘too great a change in our legal system and one which would not be warranted by any existing flaws in (Articles 40-44). It would mean jettisoning almost sixty years of well established and sophisticated case law.’⁷⁴ Also, as commented above, in some respects the guarantees contained in the Constitution are more extensive than those found in the European Convention, therefore a straightforward replacement of the Constitutional provisions with those contained in the Convention could certainly have the potential to be disadvantageous.⁷⁵

⁷¹ D. Andrews TD, *Dail Debates*, volume 487, 19 February 1998.

⁷² *Report of the Constitution Review Group*, 1996, Stationery Office, Dublin, at p.219.

⁷³ Hogan, *supra* n 32 at 209-210.

⁷⁴ *Report of the Constitution Review Group*, op. cit., at p.218.

⁷⁵ Hogan, *supra* n 32 at 209.

Another possible course of action was that of following the example of the UK and incorporating the Convention by an ordinary Act of Parliament. Writing in 1999, Hogan remarked that,

This procedure makes little sense in the context of a written Constitution...The courts cannot invalidate one ordinary law by reference to another ordinary law (as an ordinary law incorporating the ECHR would be): they can only do so by reference to the Constitution itself. Besides, there would be great uncertainty and the overlapping of guarantees in such areas as free speech, personal liberty, (and) property rights between the ordinary law incorporating the ECHR and the Constitution itself.⁷⁶

Nevertheless, this was the method of incorporation which was eventually chosen. The European Convention on Human Rights Bill was introduced in April 2001, and was eventually enacted into law on 31 December 2003. The legislation was described by one commentator as ‘an Irish solution to what is perceived to be an Irish problem, i.e. how to incorporate the ECHR in a way that will avoid conflict with Irish constitutional law and jurisprudence.’⁷⁷ When the Bill was introduced it was greeted with disappointment by those who had supported incorporation, such as the Irish Human Rights Commission.⁷⁸ O’Connell *et. al.* comment that,

the debate on incorporation of the ECHR into Irish law was characterized by strong expressions of scepticism about the likelihood of added-value in terms of impact. On the one hand, proponents of the limited mode of incorporation took the view that the ECHR had little to add – by way of substantive human rights protections – to the level of such rights protection guaranteed by the 1937 Irish Constitution. Opponents saw this as something of a self-fulfilling prophecy and argued that a stronger model of incorporation would create a context in which the real potential of the Convention to add value to substantive rights protection could be more fully explored.⁷⁹

Writing in 2001, Murphy remarked that, ‘Given the constitutional issues and the unresolved tensions between the domestic and international legal order, it came as no surprise that the proposed European Convention on Human Rights Bill 2001, provides for a minimalist form of incorporation.’⁸⁰

⁷⁶ Hogan, *supra* n 32 at 209.

⁷⁷ Murphy, *supra* n 31 at 640.

⁷⁸ O’Connell, *supra* n 46 at 7.

⁷⁹ O’Connell *et al*, *supra* n 58 at 15.

⁸⁰ Murphy, *supra* n 31 at 653.

4. The European Convention on Human Rights Act 2003.

As with the UK's Human Rights Act, one of the fundamental features of the European Convention on Human Rights Act consists of an interpretative obligation which is placed upon national courts. Section 2(1) of the 2003 Act states that, 'In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.' This provision is similar to section 3(1) of the Human Rights Act, which states that, 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' The decision to follow the UK's approach in this respect did not however meet with universal support. For example, Murphy commented that the adoption of an interpretative model was 'both unfortunate and unnecessary', as the concept of parliamentary sovereignty which applies in the UK is not applicable in Ireland.⁸¹ Nevertheless, it should be noted that the interpretative obligation imposed by the Irish legislation does differ from its UK counterpart in that it applies not only to primary and subordinate legislation but also to any rule of law, thereby encompassing the common law.

Section 5(1) of the European Convention on Human Rights Act states that,

In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that benefit by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

Section 5(2)(a) proceeds to state that, 'A declaration of incompatibility shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made.' In this respect, a declaration of incompatibility under the 2003 Act differs substantially from a declaration of unconstitutionality under Article 34 of the Irish Constitution. Unlike a declaration of incompatibility, a declaration of unconstitutionality has the effect of invalidating the legislation in question. Under section 5(4) of the 2003 Act, any court order containing a declaration of incompatibility must be laid before each House of the Oireachtas within the next twenty-one days on which that House has sat following the making of the order. An *ex gratia* payment of compensation may be made by the government to the injured party upon application by that party to the Attorney General. An adviser may be appointed to advise the government on the appropriate level of compensation to be awarded and that adviser

⁸¹ Murphy, *supra* n 31 at 651.

must take into account the principles and practice applied by the European Court of Human Rights as regards awarding just satisfaction under article 41 of the European Convention. Clearly the procedure of making a declaration of incompatibility under the European Convention on Human Rights Act is very similar to that of making a declaration of incompatibility under section 4 of the Human Rights Act. There is however no provision in the 2003 Act for a ‘fast track’ method of amending legislation which has been the subject of a declaration of incompatibility, such as is found in section 10 of the Human Rights Act.

Section 3(1) of the European Convention on Human Rights Act provides that, ‘Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions.’ Section 3(1) is similar to section 6(1) of the Human Rights Act, which states that, ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right.’ The additional wording in section 3(1) of the 2003 Act stating that this duty is ‘subject to any statutory provision...or rule of law’ is somewhat interesting. As O’Connell *et. al.* point out, if an organ of the state attempted to defend its actions on the grounds that another statutory provision or rule of law required it to act in a manner that were not compatible with the Convention right, it would ‘in effect, be pleading a kamikaze defence.’⁸² Such a defence would essentially amount to an admission of incompatibility, thereby leaving the state open to being found in violation of the Convention by the European Court of Human Rights.⁸³ Section 3(2) of the 2003 Act provides that, ‘A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention...and the Court may award to the person such damages (if any) as it considers appropriate.’

Under section 1 of the European Convention on Human Rights Act, the term ‘organ of the State’ includes ‘a tribunal or any other body (other than the President or the Oireachtas...or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised.’ The exclusion of courts from the duty to act compatibly with the state’s obligations under the Convention provisions is somewhat striking, as it constitutes a departure from the legislative scheme contained in the Human Rights Act. Section 6(3) of the UK legislation states that the term ‘public authority’ includes a court or tribunal, which has the effect of placing a duty on the courts to act in a manner that is compatible with the Convention rights.

⁸² O’Connell *et al*, *supra* n 58 at 14.

⁸³ O’Connell *et al*, *supra* n 58 at 14.

By excluding courts entirely from the definition of ‘organ of the State’, the Irish legislature has afforded a complete exemption to the courts from the section 3(1) duty to act compatibly with the Convention provisions. This approach certainly has the merit of simplicity. However, whether this was the correct approach to adopt is debatable. As O’Connell comments, ‘The exclusion of the courts from the definition of “organs of the State” was a source of some considerable controversy in parliamentary and extra-parliamentary debates on incorporation’.⁸⁴ For example, Murphy is of the view that excluding the courts from the definition of ‘organ of the state’ is a ‘crucial omission’ and is ‘in stark contrast with the broad definition of “public authority” under section 6 of the (Human Rights Act).’⁸⁵ In the UK, the courts have used section 6 to contribute to the development of the concept of ‘horizontal effect.’ The courts, as public authorities, are under a duty to act compatibly with the Convention rights, and they interpret this duty as meaning that they can apply these rights in cases involving only private parties. However, the terms of the European Convention on Human Rights Act largely prevent the Irish courts from adopting such a course of action. Although a degree of horizontal effect can still arise through the use of the section 2(1) interpretative obligation, nevertheless the decision to exclude courts from the definition of ‘organ of the State’ has the effect of substantially curtailing the development of a concept of horizontal effect.

Section 4 of the European Convention on Human Rights Act states that courts must ‘take due account’ of the principles laid down by the declarations, decisions, advisory opinions and judgments of the European Court of Human Rights when interpreting and applying the Convention provisions. This duty is similar to the obligation placed on the UK courts by section 2(1) of the Human Rights Act to take into account the judgments of the European Court of Human Rights. It is notable that there are no provisions in the European Convention on Human Rights Act which relate to the pre-enactment scrutiny of legislation, such as those found in section 19 of the Human Rights Act.

5. The Relationship Between the European Convention on Human Rights Act and the Constitution.

One of the first questions to which the passing of the European Convention on Human Rights Act gave rise was what would be the relationship between this legislation and the Irish Constitution? For example, Murphy predicted that, ‘Irish judges may still prefer to base their human rights rulings on the more familiar jurisprudence of Irish constitutional law, and pay lip service to that of the ECHR and elsewhere.’⁸⁶ The long title of the Act

⁸⁴ O’Connell, *supra* n 46 at 9-10.

⁸⁵ Murphy, *supra* n 31 at 652.

⁸⁶ Murphy, *supra* n 31 at 656.

itself states that it is ‘An Act to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms...and certain protocols thereto’. The fact that the Act was to be regarded as inferior to the Constitution was never thus in any doubt, and the Irish judiciary has clearly stated that the Constitution retains supremacy over the Convention provisions. For example, in *G.T. v K.A.O.* McKechnie J. commented that the 2003 Act ‘gave effect to the Convention in Irish law but did so through the model of indirect or interpretative incorporation at a sub-constitutional level’.⁸⁷ Similarly, in *Mahon v Keena* Fennelly J. emphasised that in a case where a conflict arose between the Convention provisions and the Constitution, it would be the Constitution which should prevail.⁸⁸ In *J.McB. v L.E.* it was commented that,

It is true...that the courts are under a duty to interpret the law in a manner compatible with the State's obligations under the European Convention on Human Rights insofar as is possible. But it follows that a concept or right (recognised elsewhere), but not compatible with the terms of the Constitution must *pro tanto* be subordinated to the provisions of the Constitution as interpreted in national law.⁸⁹

The relationship between the Constitution and the Convention provisions was also discussed in *Edward Carmody v The Minister for Justice*,⁹⁰ in which it was stated that if an applicant sought a declaration of incompatibility under section 5(1) of the European Convention on Human Rights Act and also a declaration of unconstitutionality, the latter issue should be decided first. As Murray C.J. commented,

the court is satisfied that when a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State’s obligations under the Convention, the issue of constitutionality must first be decided.⁹¹

It appears that this principle arises from the fact that under section 5(1) of the Act, a declaration of incompatibility may only be granted ‘where no other legal remedy is adequate or available’. Indeed, in *Caroline McCann v Monaghan District Judge*⁹² it was stated that, where a declaration of unconstitutionality was made, it was not necessary or

⁸⁷ [2008] 3 I.R. 567 at para. 36.

⁸⁸ [2010] 1 I.R. 336 at para. 66.

⁸⁹ [2010] 4 I.R. 433 at para. 126.

⁹⁰ [2010] 1 I.R. 635.

⁹¹ At 650.

⁹² [2009] 4 I.R. 200.

appropriate to consider whether a declaration of incompatibility with the European Convention ought also to be made. Similarly, in *Law Society v Competition Authority*⁹³ the constitutional issue was addressed first, while the alternative claim based on European Convention provisions was regarded as superfluous as the Court had already granted an order of certiorari on the basis of the Constitution. As O'Connell comments,

as the form of incorporation chosen is explicitly sub-constitutional it follows that the rule of practice whereby constitutional issues are reached last gives way to the alternative sequential consideration indicated in the 2003 Act in cases where declarations of incompatibility are sought.⁹⁴

Brady remarks that, 'For various reasons, perhaps not least a sense of pride in the national Constitution, many cases seem to be disposed of by a finding of unconstitutionality rather than a declaration of incompatibility.'⁹⁵ Indeed, to date only three declarations of incompatibility have been made. These were granted in the cases of *Foy v An t-Ard Chláraitheoir & Ors*,⁹⁶ *Donegan v Dublin City Council & Others*⁹⁷ and *Dublin City Council v Liam Gallagher*.⁹⁸ Nevertheless, as Brady comments, 'the Convention has had a significant indirect impact on Irish law as a sort of brooding presence in the courtroom whenever the constitutionality of a provision is being judicially considered.'⁹⁹

6. The Interpretative Obligation.

Under section 2(1) of the European Convention on Human Rights Act, 'In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.' As previously mentioned, although this provision seems somewhat similar to section 3(1) of the UK's Human Rights Act, the inclusion of the phrase 'subject to the rules of law relating to such interpretation and application' means that the Irish provision is

⁹³ [2005] IEHC 455.

⁹⁴ O'Connell, *supra* n 46 at 16.

⁹⁵ P Brady, 'Convention Compatible Statutory Interpretation: A Comparison of British and Irish Approaches' (2012) 33 *Statute Law Review* 24.

⁹⁶ [2007] IEHC 470.

⁹⁷ [2008] IEHC 288.

⁹⁸ [2008] IEHC 354.

⁹⁹ Brady, *supra* n 95.

significantly narrower than its UK equivalent. As Brady argues, ‘there is a marked divergence between the two jurisdictions which is grounded in a significant difference of wording between what are otherwise two very similar statutory regimes for the incorporation of Convention rights into domestic law.’¹⁰⁰

In approaching section 2(1) of the European Convention on Human Rights Act, the Supreme Court in *J.McD v P.L. and B.M.* made it clear that section 2,

obviously is not a basis for founding an autonomous claim based on a breach of a particular section of the Act...In exercising its jurisdiction pursuant to s. 2 a court must identify the statutory provisions or rule of law which it is interpreting or applying. Even then it is subject to any rule of law relating to interpretation and application.¹⁰¹

In this case Murray C.J. considered the relationship between the interpretative obligation under section 2(1) of the Act and the Constitutional status of the Oireachtas. He referred to the fact that under article 15.2 of the Constitution, ‘the sole and exclusive power of making laws for the State’ is vested in the Oireachtas. Murray C.J. commented that due to the evolving nature of the Convention rights, as interpreted by the European Court of Human Rights,

the Oireachtas itself will not always be in a position to perceive or even contemplate, by recourse to any objective considerations, the meaning, by reference to the Convention, which may subsequently be given to the provision of an Act which it is passing (and which it might have passed in altogether different terms if it could have). This raises questions as to how the intent of the Oireachtas by reference to the text of a statute which it has adopted in accordance with the Constitution is to be determined and the relevance of that intent to its interpretation...Perhaps the answers to such questions lie in whole or in part in the proviso in s. 2, by which the requirement to interpret a statute in a manner compatible with the Convention is ‘subject to the rules of law relating to such interpretation and application’.¹⁰²

It was clear from these comments that the intention of the Oireachtas should remain paramount in cases in which the section 2(1) interpretative obligation is engaged, due to the exclusive power of law making granted to the Oireachtas under the Constitution. Nevertheless, to date the Irish Supreme Court has not considered section 2(1) of the European Convention on Human Rights Act in any great detail. There is thus no

¹⁰⁰ Brady, *supra* n 95.

¹⁰¹ [2010] 2 I.R. 199 at para. 40.

¹⁰² At para. 47.

equivalent case to that of *Ghaidan v Godin Mendoza*,¹⁰³ in which the House of Lords gave detailed consideration to the ramifications of section 3(1) of the Human Rights Act. Nevertheless, section 2(1) of the European Convention on Human Rights Act has been discussed in detail in certain High Court decisions.

The first of these cases was *Foy v An t-Ard Chláraitheoir & Ors.*¹⁰⁴ The main issue in this case was whether certain provisions of the Civil Registration Act 2004 could be interpreted in such a manner as to be compatible with the Convention provisions. The case ultimately resulted in the issuing of the first declaration of incompatibility under the European Convention on Human Rights Act. In its discussion of the interpretative obligation under the Act, the Court stated that,

it must be noted that s.2 of the Act of 2003 is not free from doubt, in particular where it uses the expression ‘...in so far as possible...’. Less wide ranging phrases such as in so far as is ‘reasonable’ or ‘practicable’ or some other such similar wording is not used. Therefore...the Oireachtas intended the courts to go much further than simply applying traditional criteria, such as e.g., the purposeful rule or giving ambiguous words a meaning which accords with Convention rights; something like the double construction test. This type of restrictive approach was rejected by the House of Lords in *R v A* [2001] 3 All ER 1 when dealing with the identical phrase contained in s.3 of the Human Rights Act 1998...

Within these restrictions...it is safe to say that the section cannot extend to producing a meaning which is fundamentally at variance with a key or core feature of the statutory provision or rule of law in question. It cannot be applied *contra legem* nor can it permit the destruction of a scheme or its replacement with a remodeled one. In addition, a given legal position may be so well established that it becomes virtually immutable in the landscape. It seems...that to apply the section in any of these circumstances, which are but examples, would be to breach the threshold, even one set as expansively as this one is. When the court finds itself so restricted the only remedy is a declaration of incompatibility.¹⁰⁵

Overall, the High Court in *Foy* appeared to adopt an expansive approach to section 2(1), much like that of the House of Lords in *Ghaidan v Godin Mendoza* to section 3(1) of the Human Rights Act.¹⁰⁶ An appeal was initially lodged against the decision of the High Court, however the appeal was then dropped in 2010.

¹⁰³ [2004] 3 All ER 411.

¹⁰⁴ [2007] IEHC 470.

¹⁰⁵ At paras. 55-56.

¹⁰⁶ As discussed by Brady, *supra* n 95.

Another High Court decision has nevertheless since adopted a more restrictive approach to the duty placed upon the courts by section 2(1) of the European Court of Human Rights Act. In *Dublin City Council v Liam Gallagher*,¹⁰⁷ the legislative provision in question was section 62 of the Housing Act 1966. This section had already been the subject of a declaration of incompatibility in *Donegan v Dublin City Council & Others*.¹⁰⁸ In *Dublin City Council v Liam Gallagher* a declaration of incompatibility was again issued in respect of this provision. In relation to section 2(1) the Court stated that,

it seems clear...that the starting point in attempting to construe this section in a Convention compatible way is to first determine the correct construction without regard to the Convention and having done that to then see whether it is possible to impose or intertwine a different meaning where that is necessary to avoid incompatibility with the Convention. Where it is not possible to achieve this without breaching the rules of law relating to interpretation, and where there is an evident breach of a Convention right resulting from what is a correct interpretation of the law in question, the proper solution to that problem is a declaration of incompatibility under s.5 of the Act of 2003.

The Court emphasised ‘the significant difference’ between section 2(1) of the European Convention on Human Rights Act and section 3(1) of the UK’s Human Rights Act. It stated that the difference lies ‘in the inclusion in s.2 of the Act of 2003 of the phrase “subject to the rules of law relating to such interpretation”. A similar provision is not included in s.3(1) of the UK Act.’

Brady comments that,

The consequences of this difference are important, because it means that in (Ireland) a Court, when attempting to construe a law in a Convention compatible way, is still bound by the rules of law which heretofore have governed such interpretation, whereas in the U.K. no such restriction is imposed by Parliament. The range of manoeuvre available to a U.K. court...is not available to an Irish Court.¹⁰⁹

It seems that a court using section 3(1) of the Human Rights Act can impose a meaning which is compatible with the Convention rights unless that meaning clearly conflicts with the express terms of the legislation in question. However, it appears that a court utilising section 2(1) of the European Convention on Human Rights Act must still adhere to existing rules of statutory interpretation whereby effect should be given to the will of Parliament, as derived from the ordinary meaning of the language in the statute

¹⁰⁷ [2008] IEHC 354.

¹⁰⁸ [2008] IEHC 288.

¹⁰⁹ Brady, *supra* n 95.

concerned.¹¹⁰ According to de Londras and Kelly, the approach of the High Court in *Gallagher* is problematic. They state that ‘if an Irish court begins by setting out the “correct” construction of a statute, arguably *any* alternative construction will be contrary to the rules of law relating to such interpretation and application of s.2’.¹¹¹ However, Brady argues that to ‘determine the correct construction’ as referred to in *Gallagher* should be to ‘determine what is the boundary of the permissible’, as opposed to ‘find the solely permissible interpretation.’ By this understanding of the *Gallagher* approach, in situations in which there are two or more interpretations which could reasonably be viewed as falling within the legislature’s intention, the courts must apply an interpretation which is compatible with the Convention rights over one which is not compatible.¹¹²

7. The Duty on Organs of the State.

Section 3(1) of the European Convention on Human Rights Act places a duty on organs of the state to perform their functions in a manner ‘compatible with the State’s obligations under the Convention provisions.’ As O’Connell states, ‘it would be incorrect to say that the Convention in any sense displaced the Constitution or other sources of Irish law as the main basis upon which actions in judicial review are maintained.’¹¹³ Nevertheless, as O’Donnell *et. al.* comment, ‘There is little doubt that recourse to Convention-based argument is now a routine practice in judicial review’.¹¹⁴ However, one of the key questions which has arisen for the Irish courts is what is the standard of judicial review to be applied in assessing compliance with human rights obligations?

In Irish law the usual test to be applied in a judicial review of an administrative decision is what is commonly referred to as ‘the *O’Keeffe* test’, due to the fact that it is derived from the principles enunciated by Finlay C.J. in his judgment in the Supreme Court in *O’Keeffe v An Bord Pleanala*.¹¹⁵ Essentially the test is that a decision ought not to be quashed on judicial review unless the decision maker has acted irrationally in the sense that the decision making authority had before it no material which would support its

¹¹⁰ Brady, *supra* n 95.

¹¹¹ F de Londras and C Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Roundhall, Dublin, 2010) at p.90.

¹¹² Brady, *supra* n 95.

¹¹³ O’Connell, *supra* n 46 at 8.

¹¹⁴ O’Connell *et al*, *supra* n 58 at 119.

¹¹⁵ [1993] 1 I.R. 39.

decision. In his judgment Finlay C.J. referred to the case of *The State (Keegan) v Stardust Compensation Tribunal*,¹¹⁶ in which Henchy J. discussed when a court could intervene to quash a decision on grounds of ‘unreasonableness or irrationality’. Essentially, in order to do so, the decision must have been fundamentally at variance with reason and common sense. This approach therefore carries strong similarities to the concept of *Wednesbury* unreasonableness in UK law.¹¹⁷ However, would the *O’Keeffe* test be applied in judicial review as regards section 3(1) of the European Convention on Human Rights Act or would a lower standard be used in such cases?

In *L.C. v The Minister for Justice*¹¹⁸ it was commented that in cases involving rights, ‘one should not depart from the...principles as applied by the Supreme Court, *inter alia*, in *O’Keeffe v An Bord Pleanala*’. However, in *M.A v The Minister for Justice*,¹¹⁹ the High Court advocated a different approach. In this case it was stated that, ‘As far as the appropriate test is concerned for cases involving an issue of Convention rights...a new approach is necessary following the passing into law of the European Convention on Human Rights Act 2003.’¹²⁰ Essentially the Court was concerned that confinement of the availability of judicial review to the terms of the *O’Keeffe* test would not be sufficient to provide an effective remedy for the purposes of article 13 of the Convention. By contrast, in *B.J.N. v The Minister for Justice* McCarthy J. commented in the High Court that he could not accept that the application of the test laid down in *O’Keeffe* would be insufficient to afford an effective remedy. He stated that he was ‘clearly bound’ by the *O’Keeffe* principles, and that these principles did not ‘contemplate any exceptional or special test’.¹²¹

However, this issue was finally resolved by the Supreme Court in its 2010 judgment in *Meadows v The Minister for Justice*.¹²² In this case it was held that the correct test to be applied in reviewing the rationality of an administrative decision which affects constitutional or fundamental rights is as stated in *O’Keeffe*. The Court was of the view that, when construed broadly, this test was sufficiently general and flexible to allow it to be applied in such a manner as to protect fundamental rights. The Court also stated that

¹¹⁶ [1986] I.R. 642

¹¹⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

¹¹⁸ [2007] 2 I.R. 133.

¹¹⁹ [2007] 3 I.R. 421.

¹²⁰ At para. 49.

¹²¹ [2008] 3 I.R. 305 at para. 6.

¹²² [2010] 2 I.R. 701.

the principle of proportionality was inherent in any analysis of the reasonableness of a decision and had a legitimate and proper function in examining whether an administrative decision was valid in accordance with the principles of *O’Keeffe*. This approach contrasts therefore with that of the UK courts under section 6 of the Human Rights Act, whereby the courts apply a somewhat more rigorous form of review than that of traditional *Wednesbury* unreasonableness.¹²³

8. A Degree of Horizontal Effect?

As previously mentioned, the courts have been explicitly excluded from the definition of ‘organs of the State’ found in section 1(1) of the European Convention on Human Rights Act and so are not subject to the section 3(1) duty of performing their functions in a manner ‘compatible with the State’s obligations under the Convention provisions.’ This means that the scope for the creation of a concept of ‘horizontal effect’, such as has been developed by the UK courts under the Human Rights Act, is heavily curtailed. As Canny and Lowry remark, this is, ‘One of the primary distinctions between the two regimes’.¹²⁴ Indeed, Michael McDowell TD, the then Minister for Justice, stated in the Dail (parliamentary) debates on the Act that the Convention rights were not intended to have the horizontal application which is afforded to the rights contained in the Irish Constitution.¹²⁵ Canny and Lowry view this as ‘one of the most important policy decisions taken in the chosen method of incorporation of the Convention.’¹²⁶ Writing in 2003, O’Cinneide commented that the exemption of the courts from the definition of ‘organs of the State’ was ‘unfortunate’. He proceeded to state that,

The presence of a duty upon the courts to give effect to rights norms has been very influential in Germany, South Africa and the UK, and this may ensure that the Irish courts will continue to adopt a less than proactive approach to developing private law in line with fundamental rights. This would be a remarkable, unfortunate and retrogressive approach to incorporation.¹²⁷

¹²³ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26.

¹²⁴ M Canny and A Lowry, ‘The European Convention on Human Rights Act 2003, a *Cause Celebre* for Privacy Rights in Ireland?’ (2004) *Bar Review* 73-79 at 77.

¹²⁵ M. McDowell TD, *Dail Debates*, volume 547, 21 May 2003.

¹²⁶ Canny and Lowry, *supra* n 124 at 77.

¹²⁷ C O’Cinneide, ‘Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights’ (2003) 4 *Hibernian Law Journal* 77-108 at 107.

Nevertheless, a certain degree of horizontal effect may still be derived from the interpretative obligation contained in section 2(1) of the Act. As Collins and O'Reilly comment,

in circumstances where the State has adopted legislation imposing obligations on private parties that have the effect of securing the protection of a Convention right...it is difficult to see why the interpretative obligation should not be invoked in proceedings between private parties concerning its application and interpretation.¹²⁸

Indeed, there does seem to be one area in which the courts are applying Convention rights, specifically the article 6 right to a fair trial, to cases involving only private individuals. This is the issue of delay in judicial proceedings. This was one of the first areas in relation to which the European Convention on Human Rights Act had a significant impact. Indeed, writing in 2006, almost three years after the coming into force of the Act, Hogan stated that, 'Perhaps the only real tangible effect thus far has been that the ECHR delay case-law has prompted the courts to take a more interventionist line so far as litigant delay is concerned'.¹²⁹ In 2009 Brown similarly commented that, 'since the ECHR Act came into force, reliance is increasingly being placed on the (European Court of Human Rights's) "delay" jurisprudence in the domestic courts where the potential of Article 6 as an additional weapon in delay cases has not gone unnoticed.'¹³⁰ She also stated that such cases,

demonstrate that the post-incorporation ECHR does, in reality, have a certain *de facto* horizontal effect: in delaying legal proceedings, a private party can find themselves punished by the courts for violating the other side's right to a speedy determination of the legal controversy at issue.¹³¹

The jurisprudence on this matter originated in the Supreme Court case of *Gilroy v Flynn*¹³² in which Hardiman J. commented that

¹²⁸ AM Collins and J O'Reilly, *Civil Proceedings and the State* (Roundhall, Dublin, 2003) at paras. 11-21.

¹²⁹ Hogan, *supra* n 47 at 336.

¹³⁰ E Brown, 'Article 6 and Civil Cases' in U Kilkelly (ed), *ECHR and Irish Law* (2nd ed., Jordan Publishing Limited, Bristol, 2009) 109 at 118.

¹³¹ *Ibid.* at 123.

¹³² [2005] 1 I.L.R.M. 290 at 293-294.

following such cases as *McMullen v. Ireland*...and the European Convention on Human Rights Act 2003 the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.

In *McMullen v Ireland*,¹³³ the European Court of Human Rights found a violation of article 6(1) of the European Convention due to legal proceedings not having been dealt with within a reasonable time. However, the question of how precisely the European Convention on Human Rights Act contributes to the placing of such an obligation on the courts is somewhat unclear, given the fact that the courts are not subject to the section 3(1) duty of performing their functions in a manner ‘compatible with the State’s obligations under the Convention provisions.’ Essentially, it is difficult to reconcile the obligation referred to in *Gilroy v Flynn* with the usual approach of the Irish courts whereby, ‘The European Convention on Human Rights does not produce free standing rights in national law’.¹³⁴ Nevertheless the *Gilroy v Flynn* approach has been followed in a number of cases. For example, in *Allergan Pharmaceuticals (Ireland) Ltd v Noel Deane Roofing and Cladding Limited, M.J. Conroy and Sons Limited, and Liam Mullaly and Aiden Leonard*,¹³⁵ a case involving only private parties, it was stated that ‘courts now under the European Convention have their own obligation to ensure civil actions are heard within a reasonable time’.¹³⁶ The *Gilroy v Flynn* approach was also cited with approval by the Supreme Court in *Gerald J.P. Stephens v Paul Flynn Limited*.¹³⁷

The issue of delay was considered again by the Supreme Court in *Desmond v M.G.N. Ltd*.¹³⁸ In this case Geoghegan J. adopted a different approach, stating that in her view the comments of Hardiman J. in *Gilroy v Flynn* on this issue were *obiter dicta* only. Geoghegan J. was of the opinion that it was neither necessary nor desirable that the established principles relating to delay in Irish law should change or be revisited in light of the European Convention on Human Rights. However in a dissenting judgment, Kearns J. stated that ‘the legal landscape with regard to delay has undoubtedly altered following the coming into operation of the European Convention on Human Rights Act 2003. Section 4 of that Act requires that judicial notice be taken of the Convention

¹³³ App. no. 42297/98, 29 July 2004.

¹³⁴ *J.McB. v L.E.* [2010] 4 I.R. 433 at para. 140.

¹³⁵ [2009] 4 I.R. 438.

¹³⁶ At para. 22.

¹³⁷ [2008] 4 I.R. 31.

¹³⁸ [2009] 1 I.R. 737.

provisions.’¹³⁹ It is certainly the case that under section 4 the courts must ‘take due account’ of the principles laid down by the judgments of the European Court of Human Rights when interpreting and applying the Convention provisions. Nevertheless, it is difficult to ascertain how the Convention provisions arise for discussion in the first place, given the fact that the courts are exempt from the section 3(1) duty of performing their functions in a manner ‘compatible with the State’s obligations under the Convention provisions.’

It is submitted that the most coherent manner in which to address the issue of delay can be found in another judgment of Geoghegan J. In *McFarlane v Director of Public Prosecutions*,¹⁴⁰ she outlined a number of potential approaches to the question of how the courts should address the issue of delay in the context of human rights. One of the possibilities was that account should only be taken of delay caused within the office of the Director of Public Prosecutions or the police, but not within the courts. Geoghegan J. proceeded to comment that,

It must be remembered in this connection that unlike in the case of the United Kingdom the courts are excluded from the definition of ‘organ of the State’ in the European Convention on Human Rights Act 2003. If the courts have been expressly excluded from that Act, as they have been, it might seem wrong on one view to introduce them by a back door.¹⁴¹

This certainly appears to represent the most logical manner in which to address the issue of delay. The Director of Public Prosecutions and the police are included in the definition of ‘organs of the State’ for the purposes of section 3(1) of the European Convention on Human Rights Act. An inordinate delay caused by either of these bodies could therefore give rise to a breach of the section 3(1) duty due to a violation of article 6(1) of the European Convention. However, delay caused within the courts does not breach the section 3(1) obligation, as the courts are not ‘organs of the State’ for the purposes of this provision. It remains to be seen how the case law on this issue will further develop in the future.

¹³⁹ At para. 25.

¹⁴⁰ [2008] 4 I.R. 117.

¹⁴¹ At para. 4.

9. The Overall Impact of the European Convention on Human Rights Act in the Irish Courts.

Writing in 2001, Murphy commented that, ‘It is arguable that, apart from District Judges being required to give reasoned decisions, it is unlikely that incorporation will have a profound impact on the daily routine and decisions of the Irish courts.’¹⁴² Nevertheless, it seems that the Act is having at least some impact on the outcomes of cases. For example, in *Makumbi v Minister for Justice, Equality and Law Reform*¹⁴³ the applicant, who was allegedly suicidal, challenged a transfer under the Refugee Act 1996 by way of judicial review. It was argued that implementation of the order would constitute a threat to the right to life of the applicant as protected by Article 2 of the European Convention and Article 40.3 of the Constitution. Geoghegan J. stated,

I am satisfied that it would not be in breach of any rule of interpretation to construe the powers and/or duties of the respondent in relation to the implementation of a transfer order...as including a discretion not to implement a transfer order where to do so would be in breach of the State’s obligations under Article 2 of the Convention.¹⁴⁴

A declaration was therefore granted stating that the Minister had a discretion not to implement the transfer order and also a power to revoke the order in circumstances in which evidence is presented indicating a substantial risk of suicide if the order were to be implemented.

Nevertheless, in many cases plaintiffs submit arguments based both on the Constitution and on the Convention provisions, with the courts then deciding the case on the basis of the Constitution and noting that the same result would also be obtained using the Convention provisions. For example, in *T.H. v DPP and His Honour Judge Peter Smithwick*,¹⁴⁵ the applicant was charged with an offence under the Criminal Law (Rape) (Amendment) Act 1990. The applicant alleged that various irregularities had resulted in violations of his rights under both the Constitution and the European Convention. It was held that the delay in question was of a magnitude which violated the right to a reasonably expeditious trial under the Constitution. It was therefore unnecessary to consider the case under article 6 of the Convention. Alternatively, in some instances the

¹⁴² Murphy, *supra* n 31 at 655.

¹⁴³ [2005] IEHC 403.

¹⁴⁴ *Ibid.*

¹⁴⁵ Unreported, 9 March 2004, High Court.

courts address cases using the provisions of the Convention, and then state that the same result would also have been reached using the Constitution as a basis. For example, *J.F. v DPP*¹⁴⁶ concerned an applicant who had been accused of sexual abuse of a minor. He sought to have the complainant examined by an independent expert. The complainant, who had been examined on six occasions by a psychological expert nominated by the DPP, refused this request. It was held that the refusal of the complainant was inconsistent with the right of an accused to call rebutting evidence. Hardiman J. also held that it was inconsistent with the principle of ‘equality of arms’ found in Article 6 of the European Convention. In doing so, she stated,

I have addressed this case, in part, in terms of the jurisprudence of the European Court of Human Rights out of deference to the arguments addressed to the court on that basis and to the aptness of certain of the citations. I do not believe, however, that the Convention in this instance supplies rights lacking in the constitutional regime of trial in due course of law; I am quite satisfied that the same rights are afforded by domestic law. Indeed, the fact that the right to independent examination of a plaintiff, under pain of the staying of his proceedings if refused, has been established in civil proceedings seems to me to demonstrate this.¹⁴⁷

Overall, as O’Connell comments, ‘the ECHR Act 2003 itself has not been decisive in many cases since incorporation.’¹⁴⁸ Nevertheless, for the plaintiffs in the cases in which Convention-based arguments did impact upon the outcomes, the 2003 legislation acted as a further and effective safeguard for their rights, beyond that of the Constitution.

10. Conclusion.

In conclusion therefore, it is certainly true to say that the European Convention on Human Rights Act has had much less of an impact on the Irish courts than the Human Rights Act has had on the courts of the UK. However, it is unsurprising that this is the case. Due to the fact that the two statutes follow a very similar legislative scheme, there is a temptation to view the two instruments as serving the same purpose. In one sense, they do serve the same function, in that they both essentially incorporate the majority of the rights found in the European Convention into domestic law in their respective jurisdictions. However, such an analysis ignores the very different contexts in which the two statutes operate. The purpose of the Human Rights Act was not only to incorporate

¹⁴⁶ [2005] 2 I.R. 174.

¹⁴⁷ At 182.

¹⁴⁸ O’Connell, *supra* n 46 at 12.

the Convention rights into domestic law, but was also to provide a bill of rights for a country which did not previously possess such an instrument. By contrast, the purpose of the European Convention on Human Rights Act was simply to incorporate the Convention provisions into the domestic law of a country which already had a substantial bill of rights in its Constitution. Indeed, one of the reasons why Ireland was the last of the member states of the ECHR to incorporate the Convention into domestic law was due to a belief that the Irish Constitution already provided a sufficiently strong level of rights protection. The Irish courts had developed a mature body of rights-based jurisprudence prior to the enactment of the European Convention on Human Rights Act, and it was therefore fairly clear from the outset that the purpose of the Act was simply to supplement this case law.

However, it is also clear that the Irish courts have engaged in a meaningful and substantial manner with the Act during the first decade of its operation. Important questions have been settled, such as the relationship between the Act and the Constitution. Nevertheless, there are other factors which limit the impact of the Act. For example, the interpretative obligation found in section 2(1) of the European Convention on Human Rights Act is framed in more restrictive terms than that which is contained in section 3(1) of the Human Rights Act. In addition, unlike the approach adopted under the Human Rights Act, the Irish courts are not deemed to be ‘organs of the State’ for the purposes of the duty to act compatibly with the Convention provisions, as found in section 3(1) of the European Convention on Human Rights Act. This greatly inhibits the development of a concept of horizontal effect, although it seems that the Act is having a certain degree of horizontal effect in the area of delay in judicial proceedings. It is true that the Act has not affected the outcomes of a large number of cases. Indeed, in many instances the plaintiffs submit arguments based both on the Constitution and on the Convention provisions, with the courts then deciding the case on the basis of the Constitution and stating that the same conclusion would have been reached using the Convention provisions. Nevertheless, there have been cases in which the Act has affected the outcome, and it seems that the Act is essentially operating as a supplement to the rights contained in the Constitution, which is precisely what it was intended to be. It will certainly prove interesting to observe how the jurisprudence under the Act will develop during the next ten years of its operation.